RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000229-ME

DEBORAH TURNER — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 17-CI-01516

RYAN SCOTT HODGE and
NAKIA MURPHY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: In this child custody action, Deborah Turner appeals from the January 8, 2019, opinion and order of the Hardin Family Court denying her request to be named the *de facto* custodian of R.M., the child at issue. We affirm.

R.M. ("the child") was born in March 2005 and is the biological daughter of Ryan Scott Hodge ("the father") and Nakia Murphy ("the mother"), who never married. The father's paternity was determined by DNA testing as set forth by summary judgment in a separate case in 2015.[1] A child support order was entered the same day in that case, ordering the father to pay $675.00 per month in support. Deborah Turner believed for many years that her son Jeffrey was the child's father, and the child lived with her in some capacity at various times until 2017. In September 2017, the father filed a petition for custody, naming the mother as the only respondent. He did not name or serve Turner with the petition. The father sought primary custody and control of the child, stating in an attached affidavit that the mother had been using drugs and drinking and that she was incapable of caring for the child. She had recently sent him a text message stating, "I am about to bring your daughter to live with you fed up." By temporary agreed order entered October 3, 2017, the family court ordered the parties to have temporary joint care, custody, and control of the child with the parties sharing equal parenting time. After some issues with exchanges, the court entered an order the following month setting forth that the parents were to exchange the child every Friday at 5:30 p.m. at the Elizabethtown Police Department. A hair follicle drug test on the mother in January 2018 was positive for cocaine.

[1] *Cabinet for Health and Family Services v. Hodge,* Hardin Circuit Court Case No. 15-J-00413.

On June 8, 2018, Turner moved to intervene in the custody action and sought to be designated as the child's *de facto* custodian. She claimed to have been the child's primary caregiver and financial supporter for thirteen years, from her birth until May 2018, when the child was placed with the father.[2] She explained that the mother had told everyone that Turner's son Jeffrey was the child's father until she identified her actual father. Turner alleged that no one had paid her any child support and that the father had only seen the child once or twice before the Cabinet placed the child with him. She claimed that the child had been with her since birth because the mother was unstable and had drug issues, her son had been incarcerated in Virginia, and the father was also incarcerated. Turner sought permanent custody of the child. By separate motion, Turner sought temporary custody of the child. The court permitted Turner to intervene by order entered September 14, 2018.

The family court held a hearing on Turner's motion to be designated as a *de facto* custodian on September 21, 2018. Turner testified that for more than eleven years, she thought her son was the father of the child. She said the child stayed at her home overnight four or five days a week. The child began staying with her all the time when the mother went into rehab in 2006. That lasted for almost two years through 2008. After that, the child was with her mother

[2] This order is not included in the certified record.

sometimes, maybe a couple of days per week, then back with Turner. At the time of the hearing, the child was in eighth grade. The child lived with Turner from the time she was in kindergarten and through the fourth grade. The child began staying more with her mother in seventh grade. At that time, she stayed with the mother a couple of days a week, and she spent the rest of the week with Turner or her son, Jerry. This went on until the child was placed with the father in May 2018, after the mother failed a drug test. Turner testified that she had the child in her home until May 7, 2018.

Turner testified that she was the primary caregiver and financial supporter of the child from 2006 through August 2017. In August 2017, Turner and the mother began splitting time. Her son Jeffrey, whom she believed to be the father of the child, had been incarcerated in 2004 for eight years, meaning that he could not care for the child. The mother had given Turner $400.00 three times over the twelve-year period. No one else had given her money to take care of the child.

On cross-examination, Turner said that she had the child with her most of the time during the mother's custody weeks; the father had the child on his weeks, although he would let Turner have the child on his weekends from time to time. The child would spend maybe a day at her son Jerry's house every once in a while. She knew in 2015 that the father was in the picture and was visiting with

the child, but she did not know how many times he saw her. Prior to 2015, she did not know about the child's father.

Jennifer Ford testified next. She was a teacher at Woodland Elementary, and the child was her fifth grade math student. She also knew Jerry through coaching. Turner and Jerry appeared for open houses and activities. She would also see the mother at the school for events; the mother had a younger child at the school as well.

Jatoria Broughton was the last witness to testify. She is a middle school teacher in Louisville and has known Turner since 2003. Her husband and Turner's son Jerry are best friends. She and Turner were close, and she considers Turner to be her aunt and the child to be her niece. Ms. Broughton said the child lived in Turner's home a lot of the time from the time she was born or at Jerry's home. The child spent time at her home as well. Turner provided clothing, shoes, and basketball equipment for a decade. The child also spent a lot of time at Jerry's house and would spend the night at his house with Ms. Broughton's daughter on a regular basis. Jerry would do basketball drills and run with them for training. This would happen two or three times per week, although at times it would be every morning. Jerry would also take the girls to school after early morning practices and provide dinner for them. He would pay for basketball shoes and equipment. Ms. Broughton said "everybody would be on top of" everything the child needed.

She could not dispute that the child stayed with the mother a couple of days a week. She said Jerry was not around while in college from 2004 to 2008.

Following the hearing, the parties filed briefs on the issue of whether Turner's status as a *de facto* custodian followed her through September 2018. The father specifically argued that Turner and the mother had hidden from him that the mother had abdicated her role as parent and that he had been paying child support to the mother even before an order had been entered requiring him to do so.

The family court entered an opinion and order on January 8, 2019, denying Turner's motion to be designated as a *de facto* custodian. The court concluded that Turner's standing to assert the status was broken when the mother reestablished her care from 2008 through 2015 and because of Turner's knowledge that the father had petitioned the court for custody in 2017 after a child support order was put in place. This appeal now follows.

On appeal, Turner argues that she presented clear and convincing evidence that she was the child's primary caregiver and primary financial supporter for the requisite amount of time. The father contends that Turner's status as the child's *de facto* custodian, if she ever had that status, was not permanent and had ended well before Turner intervened in his custody case in her attempt to invoke that status.

Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the family court as well as review in the Court of Appeals:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

See Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous."). The *Asente* Court went on to address substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. (footnotes omitted).

CR 52.01 provides that a reviewing court must afford "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." And "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998) (citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967)). *See Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) ("When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).").

The issue before this Court is also a question of law because it deals with the interpretation of Kentucky Revised Statutes (KRS) 403.270. *See Meinders v. Middleton*, 572 S.W.3d 52, 56 (Ky. 2019); *Cherry v. Carroll*, 507 S.W.3d 23, 26 (Ky. App. 2016). KRS 403.270 defines a *de facto* custodian as follows:

> (1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, "de facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be

> included in determining whether the child has resided with the person for the required minimum period.
>
> (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

In *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796, 798 (Ky. App. 2001), this Court explained that in order to meet this status, a person is "required to show not only that [he or she] had been the primary caregiver for the child but also the primary financial supporter of the child in order to prove de facto custodian status."

This Court addressed the application of this statute in *Sullivan v. Tucker*, 29 S.W.3d 805 (Ky. App. 2000), in which the grandparents argued that once such a status is established, they were entitled to participate in custody matters related to the child. We disagreed, holding:

> [T]he basic effect and most obvious intent of this statute is to give standing in a present custody matter to non-parents who have assumed a sufficiently parent-like role in the life of the child whose custody is being addressed. Beyond this basic meaning, however, Linda and Ronald maintain that they are presently entitled under the statute to be declared eligible to participate in any and all future custody matters involving Amber and Kamron. We do not read KRS 403.270 as abrogating to this extreme

> extent the trial court's usual authority to determine on a case-by-case basis the standing of non-parents in custody matters. *Posey v. Powell*, Ky.App., 965 S.W.2d 836 (1998). The construction of KRS 403.270 that Linda and Robert advance implies that the General Assembly intended a radical change in this state's domestic relations law, a change effecting a profound modification of a fit parent's right to care for and raise his or her child in the manner he or she thinks best. *Davis v. Collinsworth*, Ky., 771 S.W.2d 329 (1989). *See also Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Were such a change truly intended, we believe that it would have been clearly expressed. Instead, the statute provides that
>
> > [o]nce a court determines that a person meets the definition of de facto custodian, *the* court shall give the person the same standing in custody matters that is given to each parent under this section . . . . (emphasis added).
>
> This language ("*the* court," not "every court thereafter"), rather than implying the radical result urged by Linda and Robert, suggests that the determination of de facto custodianship is a matter that must be addressed anew whenever the status is asserted. This is not to say that a prior finding of de facto custodianship has no bearing on a subsequent determination. Nor is it to say, as the trial court opined, that possession of the child is a necessary prerequisite to recognition of de facto custodian status. It is only to say that a finding of de facto custodianship does not thereafter have the conclusively presumptive effect Linda and Robert assert.

Sullivan, 29 S.W.3d at 807-08. *See also Gross v. Herrington*, No. 2016-CA-001132-ME, 2017 WL 1041229, at *2-4 (Ky. App. Mar. 17, 2017), in which this

Court extensively addressed the question as to whether an interruption destroys the status.

In the present case, the family court carefully considered the rather confusing facts and timeline in determining whether Turner was entitled to be designated as the child's *de facto* custodian. The court held:

> Mrs. Turner's status was asserted on June 8th, 2018 by motion filed by then counsel Hon. John H. Schmidt. This was perhaps a decade after [Turner] was clearly a de facto custodian and two to three years after the natural mother began taking more of an interest in the child's life and eight (8) months after an agreed order of custody was entered with the natural father.
>
> . . . .
>
> In this case, the Court holds that the standing to assert de facto custodianship was broken by the natural mother's reestablishment of care in 2008 through 2015, as well as the knowledge of the petition filed by [the father] in 2017 for custody after child support was put in place by [him.] . . . [The father] filed his petition for custody after establishing paternity and filed his petition[] for custody in September, 2017. [Turner] was aware of this filing and aware of the agreed order that was entered in October, 2017 but the de facto custodianship was previously in question because of the natural mother's actions between 2015 and 2017. In this case, since de facto custodianship had never been granted to Mrs. Turner in the past there need not be any determination of unfitness or relinquishment of that status. Mrs. Turner took no steps to insure her status in 2006 through 2008 when she was clearly a de facto custodian of the child.

We must agree with the father that the family court did not misinterpret the statute and properly declined to designate Turner as the child's *de facto* custodian based upon the evidence produced at the hearing. The father had been paying child support since at least late 2015 when paternity was verified, and an agreed order concerning custody between the mother and the father had been entered in September 2017 that split custody between them on a weekly basis. Turner did not move to intervene in the custody action until the following June and had never sought to be designated as a *de facto* custodian before that time. And the testimony at the hearing did not support Turner's claim that she had been acting as the child's *de facto* custodian over the recent past several years. In particular, the testimony of Ms. Broughton established that the child spent a considerable amount of time at Turner's son Jerry's house, as well as her own house. She testified that Jerry and others collectively provided for the child's financial support, not just Turner. Accordingly, we cannot hold that Turner established by clear and convincing evidence that she was the child's *de facto* custodian after 2015, and even if she had been able to establish this status earlier, the status was interrupted and in any event was subject to be considered anew. We therefore hold that the family court did not abuse its discretion or err as a matter of law in determining that Turner was not the child's *de facto* custodian for purposes of a custody determination.

For the foregoing reasons, the opinion and order of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barry Birdwhistell
Elizabethtown, Kentucky

BRIEF FOR APPELLEE RYAN SCOTT HODGE:

Carol B. Meinhart
Radcliff, Kentucky